TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD WORKSHOP MEETING

1:26 p.m.
Wednesday,
October 13, 2010

200 East Riverside Building 150, Room 1.B.1 Austin, Texas

BOARD MEMBERS:

Victor Vandergriff, Chair Cheryl E. Johnson, Vice Chair Cliff Butler Jim Campbell Ramsay Gillman Victor Rodriguez Marvin Rush Laura Ryan Johnny Walker

STAFF MEMBERS:

Ed Serna, Executive Director Brett Bray, General Counsel

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PROCEEDINGS

MR. VANDERGRIFF: It is 1:26 p.m. and I call to order the Department of Motor Vehicles Board meeting on a workshop on the items that are listed on our agenda.

I want to apologize for starting this 26 minutes late. I appreciate the indulgence of the board and all of those present. This is one of those days that I think you probably all heard that Senate Transportation and Homeland Security is meeting today, and we started bright and early at 8:00 in the morning and continued. And I did double duty today. My toll road was also up here, or all transportation issues are up here talking to Senate Transportation. so it was great in terms of having everything condensed into one day, which was nice versus multiple trips, but it did, unfortunately, mean that we started a little bit late here. So again, I apologize for that.

With that, I'd like to have a roll call and establishment of a quorum. Board Member Gillman?

MR. GILLMAN: Present.

MR. VANDERGRIFF: I'm just going to ask you to identify yourself for the record instead of me saying your name.

MS. RYAN: Laura Ryan.

MS. JOHNSON: Cheryl Johnson.

ON THE RECORD REPORTING (512) 450-0342

MR. CAMPBELL: Jim Campbell.

MR. RUSH: Marvin Rush.

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MR. BUTLER: Cliff Butler.

MR. VANDERGRIFF: And I'm Victor Vandergriff, so for the record, we do have a quorum. Our board members Victor Rodriguez and Johnny Walker are absent. My understanding is Chief Rodriguez will join us at some point this afternoon, he's in route, and I think Mr. Walker will not be here today but he's expected to be present for our board meeting tomorrow.

I'll ask if there's anybody in the audience from the public that wishes to speak. All right. We have no cards, nobody indicating they wish to speak.

So with that, we're going to kind of move down the order a little bit. The first, the vice chair has really led a lot of the work on this, and she would like to, if at all possible, if we get more board members here for the discussion about the board roles and the processes and the internal and external communications, so we're going to move that one to the bottom of the agenda and see how far we go on the others first.

So I guess I'm moving number 3 up to the top of the agenda which is the presentation of the DMV administrative decisions and rules, and for the board members' memory sake, this was carried over from the last

meeting and it's really designed to go over the process again a little bit but at the same time helping us hone in on the framework, if you will, of what our ability is in certain types of cases to make decisions, within the framework of the record, within the framework of the law, and our charge as a board.

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For example, we do not serve as a brand new judge and/or jury over a case, we're reviewing the record that has been created at SOAH, and I think that Ms. Cost and our general counsel, Mr. Bray, will address some of that in their discussion.

So with that, I will turn it over.

MR. BRAY: Mr. Chairman, members, Brett Bray, general counsel to the DMV.

And before I begin today, I'd like to take just a moment, if I am free to do so, and note the passing yesterday of Gene Fondren, the former president of the Texas Auto Dealers Association. I could speak about him for the rest of the afternoon, as I'm sure a lot of other people in the room could, but I would just like to say that he was a true legend and I counted him as my friend, and I commend him to your thoughts and prayers.

I've been asked today to provide the board a refresher on your duties as the final decision-making body in a contested case. The chair asked that I do this, and

unfortunately, life refuses to slow down for either of us, so I haven't been able to impose upon him to coordinate the way we would normally like to do, so if I miss the mark, this is all on me, and hopefully we can have additional dialogue with you all and help me get you what you need.

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To start, I'm only concentrating on contested cases today. As you know, you also function as quasi legislators when you're in your rulemaking mode, and you have that special formal opinion process to administer as well.

In deciding contested cases, you are acting in a quasi-judicial capacity. You are, for all intents and purposes, judges, and as a panel, you pass on final orders. In many ways, you are held to the ethical and legal standards judges must follow. For example, I have borrowed this language from the Code of Judicial Conduct and modified it for your particular circumstance. If we had power points, I would be putting this language on the wall wight highlighter.

The board shall abstain from public comment about a pending or impending proceeding which may come before the board in a manner which suggests to a reasonable person the board's probable decision on any particular case. Our constitution and the legislature

intend for the litigants to have a level playing field upon which to present their case and not be hamstrung by perceptions that they might be preconceived notions on the part of judges. Boards and commissions are equally expected to present an environment of fairness and objectivity.

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In this regard, it is a great temptation for board members to go of the dais once they have voted on a final order in a case and engage in what I call locker room dialogue where the equivalent of game film highlights are discussed. It's almost painful not to be able to have such a discussion with your fellow board members who are literally your teammates. However, the game isn't over. You can be asked to replay it through the motion for rehearing process and you can be told to replay it through the judicial appeal process. Any substantive discussion of a case while there is a potential for you to hold sway over the dispute can land us in jeopardy with the Open Meetings Act.

In imagining how I'd present this to you today,

I wound up visualizing a large winding staircase. It

would have made another good power point slide. I'd have

it spiraling pretty much to the sky with hundreds and

hundreds of steps. At the top of the flight sits the

board. Depending on what action we're talking about, the

first step might be the purchase of a vehicle that ultimately causes the owner performance problems or it might be a potential buyer of a vehicle that believes she has been mistreated by a licensee. Whatever the action, there are many, many steps to the top of the staircase.

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There are initial steps including the filing of a complaint or a protest which formally starts the administrative process for the agency. Depending on the case, there may be investigations, there may be legal forms of discovery conducted. Towards the top of the staircase there's a formal hearing that's held. In this case it's required to be held by the State Office of Administrative Hearings. There evidence is taken with all the formality and trappings of a traditional court proceeding and a proposal for decision is produced. The proposal is to you.

The pretty much universal rule is that board members must never descend the staircase, and what I mean by that is members are not entitled to insert themselves anywhere into a case any more than a trial judge may investigate or conduct discovery for a party.

There's a famous Texas case where a board member actually took it upon himself to conduct a sting or investigation of a licensee, even to the point of donning a disguise and pretending to be a patient. Of course, as

you can imagine, this was found to be a violation of the licensee's constitutional rights to due process and the board's actions were not only overturned but heavily criticized by the court.

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Professor Ron Beal at Baylor University Law
School is very active in the administrative law community.
While there may be as many things that I disagree with him about as I agree with him, one statement he makes is black letter law. The fact-finder must base a decision exclusively upon the evidence introduced into the hearing record or such matters that were officially noticed.

There are presently three sources of final orders being issued by the agency: the executive director has sway over motor carrier complaints; the Motor Vehicle Division director has responsibility for Lemon Law and Transportation Code Chapter 503; and this board has responsibility of franchise, warranty performance and enforcement complaints under the Occupations Code.

It's equally important that the executive director and the Motor Vehicle Division director stay within the record, but they have an advantage on you because they deal with this material day-in and day-out. The Motor Vehicle Division director is a trained lawyer and is well-versed in the fine points of due process, the executive director has the advantage of time to reflect

and consult with counsel, while you must act in an open meeting and under pressure. I'd like to come back to this staying within the record in a moment.

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We've gone over the conventional procedural steps in a contested case before and I had power points for you that listed some of the steps where you have a notice of hearing, you'll have SOAH taking a case and actually hearing a case, a proposal for decision is issued, material is presented to the board, there may be a request for oral argument, there may be exceptions filed if the board disagrees with the SOAH proposal. There are very limited circumstances where you can change findings of fact and conclusions of law. You'll issue a final order. There can be the possibility for a rehearing, and if you vote for a rehearing, then there's a possibility of a rehearing.

The other alternative is it can go on through the court system and it could come back to you in that way as well.

I've mentioned the pitfalls of replaying the game film when you have this potential of it coming back to you, but there's another thing I wanted to mention about these steps and it involves control. While a matter is in the SOAH judge's hands, he or she has overall control of the process until such time as the case is transferred back to the agency. In fact, the Government

Code provides that SOAH does not have, and in our experience, does not, adhere to agency rules of procedure.

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Going back to my staircase metaphor, I'd like to tell you why it's so important that you stay within the record. As you well know, state agencies and their administrative heads enjoy certain protections from lawsuits. One basic concept is that when you perform a discretionary act exercising your judgment in good faith, you are immune from suit even if conventional wisdom is that you got the answer wrong.

The legal concept or phrase associated with my descending the staircase is called ultra vires. When an agency strays outside its authority, it commits an ultra vires act. To illustrate, if a board member descends the staircase and seeks to interject information that is not contained in the record, a claim of ultra vires activity may be leveled.

Administrative law litigants are afforded similar rights under the Texas Government Code and Texas constitution as those in other forums. Among those are the right to due process. Parties are entitled to rely on evidence being taken under oath, being subject to challenge by the opponent, and fair opportunity to address it. If the board were to allow matters not included within the record to be considered and influence its

decision, an attack based on ultra vires claims may be asserted.

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If a claim of ultra vires action is successful, it can not only negate the hard work the board has already done but subject the agency and its members to potential monetary damages awards.

I'd also like to talk about another sensitive matter. There is a debate going on in the legal community, and more specifically, the administrative law section of the bar, about SOAH judges' power versus that of agency boards and commissions, at least as it relates to findings of fact and conclusions of law.

We have discussed several times now that you may only change or reject a SOAH judge's proposed finding of fact or conclusion of law for specific reasons outlined in 2001.058 of the Government Code. What is a finding of fact? It's a determination from the evidence of the case. What's a conclusion of law? It's a statement as to the law applicable on the basis of the facts found.

For example, you might be presented with a proposed finding of fact that a dealership is licensed, another that it sold vehicles on a given Saturday, and then that it sold vehicles on a consecutive Sunday. You might then be presented with the proposed conclusion of law that the dealership violated the Blue Law. If only

they were always this simple; they never are.

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Nonetheless, the controversy that has erupted in the administrative law bar stems from a frequent SOAH practice of placing a recommended outcome of the case within a conclusion of law. In our example, there might be a conclusion of law proposed that sets out what the punishment should be for a violation.

Now, there are some members of the bar that believe that this is perfectly fine, it's within the legislative scheme, and that boards and commissions should not be able to modify punishment from that recommended other than for the reasons in 2001.058 that we keep mentioning.

There are others in the bar, myself included, that do not think that a recommended outcome is truly a conclusion of law. We believe the legislative purpose of SOAH is to create a forum for conducting hearings, not to take the place of the various agencies charged with regulating a given community.

For example, it might be that the board would find that the penalty should vary depending on how many vehicles the offending dealer sold during the weekend or whether the dealer is a sophisticated metropolitan mega dealer or a small mom-and-pop shop in Eagle Pass, or whether it was a first offense or a repeat pattern. It might also be that the board does or does not find a

particular offense more serious than another. I think the chair might not necessarily think a Blue Law offense is as bad as an odometer rollback.

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An administrative law judge might also make these distinctions but it's a question of who should be doing it. I don't mean to suggest that the board shouldn't articulate reasons for rejecting a particular recommendation, you must. I do think that a recommendation is just that, no matter how well cloaked in conclusions of law clothes it may be.

Why am I bringing this to your attention? I believe the matter is ripe for resolution by the courts. There are cases that talk about penalties and conclusions of law, but I'm convinced that the issue of whether a recommendation is improperly posed as a conclusion of law has never really been squarely put before the courts in this state. I bring it to you today hopefully to persuade you to agree with me, but at the very least, to prepare you for the controversy whatever your viewpoint may be.

If the matter comes up in a board case and goes up on appeal, I can't promise you that the courts will see it my way. I do, however, look forward to Linda Secord presenting the argument that a recommendation is a recommendation and a proposed conclusion of law is something different. Of course, she'll do it much more

eloquently than I ever could.

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This is an issue that transcends this board, all agencies need to know what the answer is, so I'm suggesting to you that you're not bound by the criteria in 2001.058(e) when you happen upon a recommendation disguised as a conclusion of law and that you have greater flexibility so long as there is a reasoned justification for your decision.

If you choose to act on my suggestion, we may very well find your order being taken up on appeal. From a legal practitioner's point of view, that isn't really a bad thing. So long as you are exercising your judgment in good faith and staying within the record and your authority, you should not let fear of being contradicted by a court on appeal keep you from acting.

I hope that this has been of some benefit to you, and I am certainly open for any questions you might have. I don't know, Mr. Chairman, if this even sort of got where you were hoping to go.

MR. VANDERGRIFF: I would like to add -- I wrote out a couple of notes -- I think the board needs kind of a written framework that they can understand this and flow this, that they'll have that as a template for them, if you will, and obviously as soon as that could be developed would be, I think, appropriate.

Ms. Johnson, did you have a question?

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MR. BRAY: Yes. Mr. Bray, thank you for this information. Several months ago, I don't remember exactly when it was, at one of our meetings, you did do a power point presentation, as I recall, and I had extensive notes which I keep now under opinion rules and hearings, and you address hearing process, formal opinion process and rules, and I've started keeping them with me when we have cases that we need to hear because you gave some really good points in that that were really critical for us to know.

But I do have a question, and I made a note on one that there was a question, I don't remember what it is but it will come back to me. When there's a rehearing, if a rehearing is granted, some of my notes say that a rehearing would go to the Travis County District Court, but if it comes to us, are we then allowed to hear new evidence?

MR. BRAY: I kind of need to take that apart into pieces. A motion for rehearing is a formal mechanism to allow the board an opportunity to recognize it made a mistake, at least according to the person submitting the motion, and at that point the board has the choice of either granting a motion for rehearing or not. If you don't grant the motion for rehearing, your initial final order stays in place and can be appealed up the chain.

If you do grant a motion for rehearing, then you have a couple of options. One might be more oral argument in front of the board in a public meeting.

Depending on what the motion is about, another option might be sending the matter back to SOAH for the taking of additional evidence, and then resubmitting yet another proposal to you and starting over again.

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What you were referring to also had a piece that sounded a little more like when a matter has gone up on appeal and a court has disagreed with the board's order and turned it around and sent it back to the board, what happens then, and it kind of depends on what the court order says or does.

The general precept in administrative law is the courts aren't to take the place of an administrative agency. They're not supposed to tell you what to do, and it's kind of a simple way of saying it so forgive me, but they're supposed to tell you either got it wrong or you got it right, they're not supposed to tell you how to do it. So when they send it back, typically it's you go this wrong, go do it over.

When it comes back to you, depending on what it is that you got wrong, if it's a concept of law, you may be simply hamstrung and have to follow the law and vote the other way. It may be that you didn't get enough

evidence on a particualr point and you need to send it back for another hearing. Again, I can't give you a hard and fast answer because it depends upon the case, but there are different possibilities that could happen when it come back to you.

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MS. JOHNSON: That was some pretty good dancing, but thank you. I still don't understand whether we can take new evidence or if there was an error, then obviously, I guess you'd be starting over and the possibility of new evidence could come up. Because we received some information that we're going to be considering tomorrow that I think was new information, and I just want to make sure that we're even allowed to consider that.

MR. BRAY: Okay. In my view -- you're talking about, I guess, the warranty performance case -- in my view -- and we have not yet heard from the chair because I believe the first paragraph of the first submission was a request to delay hearing the case until November, so we may buy some time depending on how the chair feels about whether it stays on tomorrow's agenda or moves. But in either case, all of that information below that first paragraph, in my view, is not under a current form of admissibility and cannot be considered -- should not be considered by the board.

MS. JOHNSON: Okay. Thank you. It's difficult when you have information and then you're not allowed to even consider it. That is very difficult.

MR. BRAY: Yes, ma'am, it certainly is.

MR. VANDERGRIFF: It's a little bit of an extreme example, but it's kind of like watching TV shows where they have the trial and somebody says something that's highly prejudicial and a judge and jury are instructed to disregard it, or the judge instructs the jury to disregard it.

MR. BRAY: I probably have been a little disparaging and so I'll continue down that road for just one more line, and that is the only other thing I would add about your question concerning whether or not you can get more evidence is, as you know, the Motor Vehicle Division director has final order authority in certain other cases, and that was the capacity that I was in for quite some time, and I had very poor luck getting a rehearing.

There were cases that came before me and the parties argued and the argument might be something like we didn't really flesh that out, we don't really know so we can't tell you, and if I didn't know, I didn't feel comfortable make a decision, and I would send it back for additional evidence. I never got additional evidence.

Hopefully, if this board sends something back to SOAH, the weight of a board order would be more than the weight of a Brett Bray order, but I don't want to mislead you to thinking that it's just automatic that you're going to get a rehearing because, as I pointed out earlier, we don't really control the process when it's in their hands. And I've had them send it back and say I stand on what I submitted before.

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MR. VANDERGRIFF: Does anybody else have any questions of Mr. Bray? It's a lively group.

Do you think, in your professional opinion, watching us for a few months -- talk about loading up the gun to shoot yourself -- that we have appropriately followed d the proper decorum in deciding these decisions? Have you seen things that we ought to think about watching out for?

MR. BRAY: Yes, I have seen things I think you need to watch out for, and as Member Johnson pointed out, it is very, very hard when you're being presented with information but it's being presented in an improper fashion, not to consider it. It's very, very hard when somebody is standing at the podium and they're arguing their case and they can go on and 40 of the 41 sentences can be fine and within the record, and they throw that one sentence out there that strays outside the record but it's

something that you might be interested in and you want to ask questions about it. Well, you don't necessarily know that you've picked the one out of 41 times that you'll be straying outside the record. I've seen instances where it appears that that was getting close, and I think we all need to be very watchful of that.

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Decorum, I don't have any comments about decorum in the sense of demeanor. I think the board does an excellent job of treating the parties that come before you fairly and civilly and all those things.

Like I say, you've got to be very careful with your questions, and I guess very watchful because if you start to go outside the record, it is incumbent upon the other party, if you're asking one party about something and the other party is aware that you're going outside the record, it is incumbent upon the other party to tell you that.

As a matter of fact, there's a case called Hunter Industries out of the Supreme Court and it talks about there was an exchange between a commissioner and a staff member and it could be considered way outside the record, but the Supreme Court noted that the attorney for the other party was present, was able to object, and that commissioners repeatedly admonished parties to limit their comments to exhibits. I believe we've had this

conversation that probably that's something the chair will have to include in your own boilerplate is making sure that parties understand they need to stay within the record and not stray.

I think that's where I'll stop.

MR. VANDERGRIFF: Okay.

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MS. JOHNSON: Let me ask a followup question on that. So if the other side doesn't stop us, then shame on them.

MR. BRAY: It is shame on them. I can't promise you that that clears the board's order with the courts. It's another safeguard that ought to be exercised. And practitioners know this. Now, the problem is you've had some consumers that come before you. They not only don't know it, they're too busy going outside the record themselves. But the competent practitioners that appear before you know this, and yes, they should be assisting us in making sure we all focus on what constitutionally you should focus on.

MR. VANDERGRIFF: For the board's information and discussion item, some of the things that I guess have concerned me just a little is that, for example, on Lemon Law cases we may -- and the decisions always seem to come down based upon the law, but that we have discussed those kind of in the context of almost feeling sorry for the

person, and yet it's very clear, at least in a couple of cases, that they're here because they have a legal ability to appeal but they don't even actually qualify to be considered on a Lemon Law basis. And if we're hearing those cases, there's a point that we have to take that tack versus provide emotional comfort and support.

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So I don't know if there's anything you'd want to say there or any board member wants to ask a question about that, and maybe why we're even getting those in the first place if it, on its face, doesn't seem to even qualify for Lemon Law because the time frame has expired.

MR. BRAY: The ones that I can remember from August, in particular, did not qualify for the Lemon Law, and if I'm not mistaken, the SOAH judge somehow wound it around into the other code provision that enforces warranties which is within purview, and that's how it got teed up to be considered by the board for a board final order, I think.

I don't want to put you on the spot, but one thing is parties are not entitled under the law to oral argument, they're not entitled to make presentations to you at open meetings. They're entitled to watch you do what you do in open meetings, they're entitled to file exceptions and replies to proposals for decision, but they are not, under the law -- sorry -- entitled to oral

argument. That's an option, and most boards and commissions do that, and I've heard enough from this board to know that you're more interested in being open to folks then closed, so I get that you want to allow everybody an opportunity to be heard fairly, but you might want to keep in mind that it is a privilege, not a right.

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MR. GILLMAN: Well, if our legal counsel says this is clearly not a Lemon Law case, clearly not, then we can decide not to hear it, can we not?

MR. BRAY: Yes, sir, but I may have confused you. The fact that it wasn't a Lemon Law case is really how it got to you because under the current state of the law, the lady sitting to your left hears Lemon Law cases, the board hears the other stuff. Cases where it's outside the Lemon Law, what you're really filing a complaint for is other warranty relief basically that's not repurchase or replacement, it's repair.

MR. GILLMAN: Well, if we have a warranty problem and our legal counsel says SOAH said, here's what they did, here's the law as it is, and you can listen to it till you're blue in the face, and the consumer or the manufacturer, whatever it is, is dead wrong, then we can make a decision not to hear it, can we not?

MR. BRAY: Yes, sir, but I can't speak to you like that.

MR. GILLMAN: It's too plain English?

MR. BRAY: Yes, sir.

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(General laughter.)

MR. VANDERGRIFF: But I think it's a good opportunity for you to speak some plain English, as you're doing, to me and the rest of the board because we're just getting started in this process, really, as a one-year-old agency. And heretofore, my philosophy has been -- but the board has not voted on this and concurred with this, and you really should -- is that if someone has a case and is requesting oral argument, we let them have the oral argument. There's been some historical guidelines of how much time that they get to present that and we've generally stuck to that, I've just listened to what those historical guidelines are and stuck to it, but they've been allowed to make the oral argument.

MR. GILLMAN: And I think for the people of
Texas it's the right thing to do. But you know, I'm not a
lawyer, you are, I don't know whether you are or not, I
mean, we're like a poor jury sitting out here in a box.
We listen to what we listen to and then we listen to
advice from lawyers. But I'm not so sure we're expected
to be able to pick up, uh-oh, they're presenting evidence
that wasn't presented before. I mean, how am I going to
know that without someone with legal expertise telling me

that, or if the opposing side doesn't jump up and say, hey, that's not admissible, and then our attorney says I agree with him or I disagree with him.

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MR. VANDERGRIFF: Let the record reflect that at two o'clock that Chief Rodriguez joined us at the board meeting.

MR. BRAY: If I might take a stab at that.

That's a very good point and I can't say that you always will know. Let's take the case, and it will come back before you so I want to be really careful how we approach this, but the case that you heard back in August, I believe that there were a couple of things that probably were not in the record that were discussed, that were brought up. And we have to remember that we had a lot of pro se litigants, non-lawyer litigants there, and they don't necessarily know the boundaries to stay in.

MR. GILLMAN: Well, if they don't know, how are we supposed to know?

MR. BRAY: And where I was going to go is you can't be expected to know in every instance, however, I've got three lines of defense that I think of: one is the other side, as we've discussed, really has an obligation to tell you; two is your staff needs to stand up and assert themselves and tell you more, I guess, than we have --

MR. GILLMAN: I couldn't agree more.

MR. BRAY:

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-- three is -- and this, I believe, is your responsibility -- three is there are some things where when you didn't read anything else in the PFD and you didn't see anything else in any of the exceptions and nothing else that's been presented to you talks about it but you want to go and talk about it or they talk about it, even if they talk about it but you haven't seen it anywhere before they stand at the podium, that is a trigger, that is a key that a question might ought to come up in your mind, and you might be the first person in the room to say is this in the record. I've seen boards and commissions, not just this one, I've seen lots of boards and commissions do that

Nobody can expect you, lawyer or not a lawyer, to always do that or to always know to do that, but I would say that there are times when you might be the first person to see it.

MR. GILLMAN: If I see it, I'll be happy to say something, but I suspicion -- surely not our lawyer -would let some of that go on and we wouldn't know anything about it.

MR. VANDERGRIFF: In that regard, would it be both helpful from a board perspective and advisable from a counsel perspective, at one point in time at the beginning of the agency we talked about having a litigation counsel, we're not at that point here, but would it be advisable and desirable by the board to really have a counsel, as far as not keep the parties from testifying as to what they'd like to and make sure to get it across to us, but to be more aggressive in managing the presentation so that we stay within the bounds of what we're supposed to listen to or hear? And I'm just offering that as a question, not as a leading question.

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MR. GILLMAN: Well, I would suggest that we try it on our own and see what happens. In other words, I don't know how many of these cases we're going to be hearing all the time, and if it all of a sudden becomes a major problem, then we ought to step up to the plate and hire somebody to advise us as we go along.

MR. VANDERGRIFF: Well, that also begs another question because although they do take up time, we really haven't seen a huge influx of these cases.

 $$\operatorname{MR.}$$ GILLMAN: I hate to be the one I told you that.

MR. VANDERGRIFF: Are we expecting to see kind of consistently what we've been seeing now which is maybe one or so major case every other month or so, and a half a dozen to less what I'd call not -- every matter is important and of equal weight, but just less time, or I'd

consider more of a minor versus full-blown appeal?

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MR. BRAY: I'd like to speak to that a little bit about other cases, but as to the franchise cases, I'll look to Ms. Cost.

MS. COST: What we're having right now is what the board is hearing any case that was filed September 1 of '09 and after, so those hearings are just now making their way through the pipeline just because of the way the hearing process works. I mean, we don't know once the jurisdiction transfers to SOAH, we don't really know where they are in the process. I don't know how many cases are pending right now, but I can certainly find that out. But I suspect that you will start seeing more contested cases as time moves on just because time has moved on.

MR. RUSH: What would be your guess, two a month or four a month?

MR. COST: I'm trying to analogize it a little bit to when there was a Motor Vehicle Board in the past that was having board meetings every six to eight weeks, and I would say we had at least one, if not two contested cases in those time frames, so I would suspect you'll probably start seeing at least one a board meeting.

Within the next year, I think you'll probably see at least one a board meeting, possibly more. It just depends on how quickly parties are litigating over at SOAH.

1 MR. BRAY: And I think she's speaking the franchise cases which you actually haven't even seen a 2. real one yet. 3 MR. RUSH: That's not the only ones we'll see, 4 5 are they? 6 MR. BRAY: No, sir. 7 MR. VANDERGRIFF: We've been seeing some of the others. 8 MR. BRAY: That's right. Speaking to that, I 9 10 quess that's the other piece is as the department becomes 11 more filled out and as the reorganization takes hold and 12 focuses, there may be additional cases, just plain old enforcement cases that get generated that you'll hear, so 13 it's hard to answer his question and quarantee him that 14 15 there won't be but one or two a board meeting because I can see on the horizon the potential for more. But it's 16 17 also hard to tell because we don't control franchise disputes and we don't control the front-end behavior of 18 19 licensees. 2.0 MR. RUSH: Well, I would say in my opinion, I 21 agree with Ramsay, to start off with we just see how it flows, but if it gets too thick, then we need to do 22 23 something else. And in theory, the manufacturer 2.4 MR. GILLMAN:

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and dealer, they're not wanting to have a big fight anyway

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31 1 so they've tried to work it out before they ever got to the SOAH stage, and then you've got that buffer in there, 2. and then you've got to have somebody really want to keep 3 appealing. I mean, I'm not so sure you're going to have 4 that many cases. History has shown you didn't have that 5 6 many cases. Now, whether or not we're changing the way we 7 do business, I don't know. MR. RUSH: Well, haven't we approved to hear a 8 few more? 9 10 MR. VANDERGRIFF: Have we approved to hear a 11 few more, you mean some coming up? Yes. 12 MR. RUSH: I thought we changed some things a 13

few months ago and said we'd probably hear more cases.

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MR. VANDERGRIFF: Well, is that because we took on more authority? I know we talked about the fact that because we have specialty license plates and some things like that, we're going to be meeting regularly because we're going to have to approve things like that. But I can't remember if we did something different on the cases. I guess we're the final authority.

MR. BRAY: You're the final order authority and you're going to hear what you hear and whatever dispute comes up.

MR. VANDERGRIFF: Because we haven't delegated most of those matters so they'll come to us versus to the

staff to handle.

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MR. BRAY: That was the previous discussion is about delegation.

MR. RUSH: That's what I was talking about.

MS. COST: The board gets performance cases, the non-Lemon Law, the repair cases, those were delegated previously and they aren't now, so the board is seeing those where previous boards did not.

MR. VANDERGRIFF: Do any of you have things that you would like to see in this process that would make it easier for you to make decisions?

MS. RYAN: I think back to one of the things that you said was staying within the record, and the chairman asked have we maybe stepped across that bounds, the summary -- and I may be calling it the wrong thing, so I apologize -- the executive summary, the recap of the case prior to -- and one of the ones we had recently was the decision was here's what was made, here is our decision as a board to make, it's A or it's B -- I think those outlines are incredibly important to help keep us focused in the framework, and I think as much detail and clarification and maybe even examples of these things are not in the record. Watching you guys perform or human nature would say that you're going to want to ask this question, it's not there so don't ask.

Those types of clarifications as much as possible I think help us be much more efficient as we're listening to the cases and reviewing them. So I think the preparation ahead of time helps.

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MR. BRAY: And along those lines, the case that we were talking about earlier, you would want to see something in an executive summary from the staff saying you shouldn't consider any of that.

MS. RYAN: Based on what's already in the record.

MR. VANDERGRIFF: That's also what I was driving at because we didn't look at cases in the September meeting so it was in August, but that's the first time that we really came up with a framework for the cases, and so it was a great first effort, but I'm looking really for you to give input to the staff about. Because heretofore, they just had a request from me to do it and then input from me, and looking for you all to give input as to how.

MS. RYAN: I don't think it had the, you know, this isn't in the record piece. I think that would be a fantastic addition to that summary.

MS. JOHNSON: And I'm wondering is it fair to assume, because my assumption is that we're not going to be sent anything that we're not authorized to consider.

MR. BRAY: I don't think that's a fair 1 assumption because we, the staff, up to now -- in fact, 2. it's always been my practice to err on the side of making 3 sure that nothing is left for the board to see, that the 4 board sees everything. However, in previous times -- and 5 6 this thing we're talking about right now, the current 7 example, just came up yesterday, I believe, so we haven't had an opportunity -- in previous times, if material like 8 what we're talking about comes in that's clearly not part 9 of the record, we will send it to you with a cover that 10 11 says you shouldn't consider this for these reasons. 12 way we know we haven't excluded you but we also know we've counseled you properly. 13 You're counseling us but you're 14 MR. GILLMAN: 15 not filtering it. MR. BRAY: That's correct. 16 17 MR. GILLMAN: That's great. MS. JOHNSON: Just so long as we're aware that 18 19 it's not information that we're allowed to consider. 2.0 MR. BRAY: And I've had board members before 21 and that's the first that they look at, and if they see that, they go yippee for me, I don't have to read this, 22

MR. BUTLER: But with the volume of cases, thought, isn't it pretty well a foregone conclusion you

and they move on to something else they have to do.

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can't have oral testimony on very many of these cases or we'll be here days, be here a long time?

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MR. VANDERGRIFF: I said this earlier that I just made a short call that we'd let anybody who wanted to have oral testimony testify, however, the board had not weighed in on that. If you want to not do that, then I'm perfectly agreeable at some point, based on your direction, and by that I mean the board's direction, help the staff to administratively make some of those decisions. But if you want to cut it off at a certain level of cases, but then the question is what level would you cut off oral argument, and perhaps our staff can give some indication of what was done historically, and I know Mr. Gillman, in one of his former roles around here, he chaired the Motor Vehicle Board and banged the gavel on cases, so to speak at that point in time.

But I'm happy to take direction from the board on that.

MR. BUTLER: It just seems like to me that it will take a whole lot more time to get the job done, and when you give someone five minutes, they take ten.

MR. GILLMAN: How bad has it bogged us down so far?

MR. BUTLER: Well, I mean, we're not into it yet, really.

MR. GILLMAN: Well, that's right, and I would hate to see us make a decision, well, let's just don't hear these things, and then all of a sudden it winds up where we would have time. I mean, a lot of the creation of this board is so the public has a right to have somebody listen to it besides an administrative judge or Molly Cost here, and I think the public deserves that and hopefully we'll have the time to do it.

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Now, if all of a sudden we just get completely bogged down, then we'll have to call a calf rope, but in the meantime, I think we ought to stay on course.

MS. JOHNSON: And I would concur with Mr.

Ramsay, and I think that what might be appropriate is to consider limiting input from the various parties to whether 15 minutes or 30 minutes each or whatever would be appropriate, and when the timer goes off, it's up to the chair or one of us to say we've reached the end of the time, or staff so that we don't appear to be the bad guys.

But I absolutely don't want to give people -- I think it's important for us to hear these, I want for people to understand when they come to us what our authority is, that needs to be clearly communicated to them so that they have that in the back of their mind too, that we're limited so we don't have to go through the painful process of telling them sorry, our hands are tied,

after they've just poured their hearts for 30 minutes.

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MR. VANDERGRIFF: I would say the parties are all informed that there is a time limit so each one of them gets informed, and they're relatively tight, I mean, honestly, they're relatively tight. Depending on the depth of the case, they get more or less time, but they're relatively tight.

Mr. Butler is correct in that we probably haven't banged the gavel quite as fast or as hard, but I don't recall anybody abusing that to a large degree so far. Again, we haven't had that many.

MR. BRAY: I think another problem is, and we'll just again take the cases that you had in August, those consumers were counseled and counseled and counseled, but there are lay folks and when they know they have this right to come before an ultimate panel, it's almost impossible to explain to them that legally they don't have anything to stand on. If they have this right, they'll drive from Tahoka, Texas to do that.

So it's a very difficult situation you're in.

If you hear these cases, if you have oral argument, it's kind of if you build it, they will come, if you have oral argument, they'll come.

MR. BUTLER: Self-perpetuating.

MR. BRAY: And it's different from the

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franchise cases, by and large. Now, that case, and you'll hear it again with those litigants, is a little bit of an enigma, but generally speaking, franchise cases are pretty well prepared. By the time it gets to you the legal issues are honed in on and everybody is laser focused.

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MR. GILLMAN: They're not focused on a \$500 transmission, but when they're begging for their livelihood, they're pretty well prepared by the time they get here.

MR. VANDERGRIFF: I might make a suggestion to the board members is that your memory is probably still pretty good about the cases that we've heard -- of course, I know a couple of you were not here then -- that we heard in August, coupled with what we'll hear tomorrow, and you might go back through after tomorrow's meeting and look at the information that the staff provided you, the analysis that they provided you, and the context of the case and how it's decided and what we can consider and can't consider, and maybe see if there's something that you would suggest, while it's fresh on your mind, to make that pop out better for you. If that makes sense.

It kind of goes to what Ms. Ryan brought and Mr. Gillman has brought up about the specificity and the detail. So is that fair to ask while it's fresh on your mind to do that and send that to Mr. Bray?

MR. BRAY: One last comment?

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MR. VANDERGRIFF: Absolutely.

MR. BRAY: I take a little bit of issue with Member Ryan, in a way. The idea of preparing a segment of the executive summary for you that says these are things that would be outside the record, in a way, that's kind of like asking to span the universe for what they might possibly go out and talk about. If there are obvious things, I'm good with that and can recommend Ms. Cost do that, but I can't really in good conscience suggest to you that the staff can think of everything that can go wrong.

MS. RYAN: Let me clarify. I wasn't implying that you come up with every possible solution, and really it's more level-setting for us as a panel that puts us all on the same page of something may be obvious to me or may not be obvious to me but may be obvious to everyone else. So from a level-setting platform, I think that would be beneficial, and then, obviously, there may be other things that come when rocks are turned over, so to speak.

Does that help?

MR. BRAY: Yes.

MR. VANDERGRIFF: Can you clarify one other thing, Brett? At least my style is if a senior member of the staff certainly or a lawyer says that this is going to be communicated to the board, I'm not going to stop that

and want it to go out. But like, for example, in a case where they just basically start testifying in a letter giving additional information, is that appropriate for us to have even seen in the first place? That's not the same thing as if they're sitting here, they're here and they just start talking, but if they do that in a letter that goes to us.

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MR. BRAY: That's why my practice is to have something on top of it that says don't read this, it's not part of the record. But my concern is and my practice over the years has been if you withhold this from a board and you've got a reason for doing it, it can make one kind of anxious about when stuff comes in the mail and it's addressed to a board member, being the filter.

MR. VANDERGRIFF: Well, I understand in terms of angry customers or industry wants to make some point to board members, and I don't know if there's a distinction if it's an active legal case that's going to come before us, if that's something that we should be getting. I don't know, I'm asking the question.

MR. BRAY: It's subject really to your preference. If we get an instruction that says don't send us anything like this that we shouldn't be considering, if you're going to be attaching a memo to it telling us we shouldn't consider it, then don't send it in the first

place.

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MR. VANDERGRIFF: That's my question. And if you're asking us for direction, I'll ask the board. Do you want to see something that we're being told we shouldn't be considering?

MR. GILLMAN: If John Q. Public out here in wherever, that town in Texas you were talking about a minute ago, wants to write us a letter --

MR. VANDERGRIFF: This is not that kind of letter. I'm talking about it's a contested case, we're going to her a case like we're going to hear tomorrow, and one of the parties files off a letter to us that is outside the bounds of what we're able to legally consider. Brett's position has been that errs on the side of caution, sends us everything, even though not necessarily in six-inch headlines but he'll put or Molly will put you can't consider this but they'll send it to us.

MR. GILLMAN: What is the procedure if a Texas citizen writes the judge a letter, what happens then, if it's some other kind of case, civil case or whatever it may be?

MR. BRAY: You know that television show where the judge tells the jury you're not to consider what you just heard, well, that's what the judge went to law school for, passe the bar exam for and managed to get elected to

judge for is to be able to disassociate and not consider things that he knows are illegal to consider. And they happen, the judge drives by a billboard that might affect a particular case and the judge, whether it's a perfect world or not, I can't really speak to, but in essence, judges know what they're not supposed to consider, and do so that way.

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MR. GILLMAN: I'd rather see the letter and have you tell me to disregard it. I mean, I would be in bad conscience if a citizen wrote you a letter.

MR. BRAY: And may I just add that I've been doing some speaking here and I've been speaking for Ms.

Cost which I don't really mind doing, but really, Mr.

Serna, he controls staff and it's his policies that we'll follow, and I've just been speaking sort of for him.

MR. SERNA: And I was going to say just based on what I've already observed the board doing, plus this meeting, I think it's prudent for the staff to provide or forward straight to the board members the information we get so that the public understands that if they send something to the board, they got it. But at the same time, we need to put a cover on it that says you can't consider any of the information that you read here in the case that's coming up, or some other caveat. And Ms. Ryan mentioned if we could in an executive summary kind of say

here's what's outside the bounds.

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And I think you were referring to the material that we know about, and that's why I kind of moved the mike this way and that caused a pause to Mr. Bray. But if the staff knows that there's something that the board shouldn't be considering but we want to still forward it to you because we understand that that's the way this board wants to operate, and that make sense to me, I agree with that mode of operation. And we will do that until the board says look, don't do this anymore, or until the general counsel advises me that this is really something we shouldn't be forwarding, I mean, this is going to cause somebody to cause such-and-such a lawsuit, or put the board at risk, or something like that.

MR. GILLMAN: That's when we need to open it up for discussion again.

MR. SERNA: Right.

MR. BRAY: And you know, because this is a subject that we've been discussing now for quite some time and the chair thought it important enough to discuss, there are all kinds of special ways to do it. We could create a code among us so that if we send something to you that's got a skull and crossbones on it, you know it's something you're not supposed to consider. And forgive my attempt at levity, but my point is we could come up with a

way so that you know and we know right off that this is that category of thing.

MR. VANDERGRIFF: Any other questions at this point?

(No response.)

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MR. VANDERGRIFF: Thank you, Mr. Bray.

Again, in the interest of making sure we get stuff covered, I think that I'm going to skip, if it's all right with the board, I know Ms. Johnson and our staff have spent a lot of time in the last couple of days but really in the last several weeks going and trying to put together bills. I don't expect everybody to remember these numbers, but we've talked about them before.

One is, whether you want to call it Vision 21 or 1507 which was the number in the previous bill that was passed in the Senate, but it's, in effect, the process and standards bill creating a uniform system that would be the support for Vision 21 as it rolls out in the next few years, and it's the basic building block that needs to be there for the titling and registration system.

And the other bill is not really a cleanup of a bill from the past, it's really a statutory bill. We call it 3097 because that was the number of the House Bill that passed that created this agency, so it's really more of a DMV cleanup and administrative request from the agency.

I'm going to stop here in just a second because
I'm going to turn it over to the vice chair, but we, as an
agency, the board understood that and sent that out and
she was given authority to go out and discuss these two
general bills with the outside world and has done some of
that and has certainly worked tirelessly over the last
month to put together these bills with the staff. So I'll
turn it over to her.

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MS. JOHNSON: Thank you very much.

Sadly, I don't have any formal things to say but I am going to try and touch on everything. It's been a rather busy I guess last five or six days as well as several months.

Yesterday was a very interesting day I want to share with everybody, and I do have some issues that I need the board to be aware of so that we can begin to make decisions. But the governor has charged all public servants in Texas, both agencies and our boards, to ask the first question at all times is what is best for the people of Texas, and he's also said that we should always keep in the forefront of our mind that we need to create greater opportunity and prosperity for our citizens.

So with that in mind, with those points forefront in my mind, I had hoped, along with Ms. Giles, to accomplish the board's directive which was to take 3097

and 1507, 3097 being the cleanup bill from the creation of this agency, and the 1507 which was Senator Carona's bill, Vision 21 bill that almost made it all the way through the last session had it not been for the meltdown, and to take the proposed changes that have been gathered by staff while this board has been meeting.

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And whether it's appropriate or not for me to recognize staff, I have to stay that I do know directly that Jennifer Soldano has done an amazing job in taking everything that we say and putting it into writing, and so I have to acknowledge that. At the same time, we did have last minute issues that were discovered with 1507, and so Ms. Giles and I were not able to actually take some of the proposals to our stakeholders as we had hoped.

However, yesterday we began at the crack of dawn, meeting with the Texas Farm Bureau. We had an absolutely fabulous meeting with Mr. Garza there. We've received input from all of these and I'll share that briefly as the board tries to reach a decision in the next couple of meetings on what position to take.

We regrouped and came back for a legislative team meeting with some of the administrative staff who have been working on, or executive staff who have been working on these bills to try and fine tune how can we better communicate, how can we make sure everybody is on

the same page, and I think that was a valid meeting and hopefully a productive meeting and we will be able to move forward on trying to get everybody on the same page. When you're talking about ten or twelve different people and different personalities, it's very difficult, and that's not even counting the board at this point in time. But that was a very productive meeting.

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And then we met with TMTA, had a wonderful meeting with them, TIADA, the Motorcycle Dealers

Association, as well as TADA. I have visited several times with Tax Assessor-Collectors, particularly the three lead officers of TACA, in order to determine what their thoughts were on some of the directions that we're heading.

We're holding off on any additional fixes to some of this legislation proposals until we get a sense of where the board would like to go. One of the things that I had prepared for the chair, because I thought it was important, is that if we aren't going to specifically itemize those things that we need to come to a decision on as a board -- and understand whatever this board decides, it's not the chairman's agenda, it is not my agenda, it is this board's agenda and the majority of this board's agenda, and we may not agree on all points, we could have some 5-4 votes on some of these issues coming down the

1	pike but what you need to take comfort in and have
2	confidence in is whatever the decision of the majority of
3	the board is is the position that the board will be taking
4	when these matters come up during the next session.
5	MR. GILLMAN: One little question.
6	MS. JOHNSON: Yes, sir.
7	MR. GILLMAN: Have we seen these yet?
8	MS. JOHNSON: No, sir, you have not.
9	MR. GILLMAN: Oh, okay.
10	MS. JOHNSON: I don't think that you'd want to
11	see them the way that we've been looking at them lately.
12	We're trying to get it down to
13	MR. GILLMAN: We're going to have a little time
14	to look at this.
15	MS. JOHNSON: Oh, yes, sir.
16	MR. VANDERGRIFF: If I could jump in on just a
17	couple of things. The Vision 21 bill is like 280 pages.
18	Most of it is references to various sections that have to
19	be changed in order to effectuate the meat of the bill.
20	The DMV cleanup bill is around 50 at this point?
21	MS. JOHNSON: Thirty-eight.
22	MR. VANDERGRIFF: Thirty-eight. Sorry, a
23	little high.
24	MR. GILLMAN: That's a little more digestible.
25	MR. VANDERGRIFF: And then there's some bill

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analysis to go through those. And I was going to ask these comments but I'll just shortstop to it, what the vice chair has been doing along with the staff is now just beginning to go out to the industry and get comments from them and needs to kind of pull that in, so you're going to be looking at the bill, the comments.

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MR. GILLMAN: We're going to look at it prior to being a final product.

MS. JOHNSON: Oh, absolutely. Because we can't even finalize some of the language until we know what the opinion of the majority of the board is.

MR. VANDERGRIFF: And I also suspect, or I hope, anyway, and we've seen a little bit of this so far, at least stuff that Ms. Johnson has shared with me prior to today -- we haven't had much discussion it today, obviously, but prior to -- is some groups are asking us to consider putting this in the bill. Ideally what would work well politically, operationally is that other entities, not just the ones that she's visited so far but others would ask something be a part of it, so that as an industry -- what I'd like to think we're trying to do is as an industry move out with something that makes sense, not only to help us administratively inside the agency but help the industries that we oversee, because otherwise, they're going to shoot at it separately.

1	MR. GILLMAN: I think Vice Chairman Johnson is
2	doing a heck of a job.
3	MS. JOHNSON: Thank you.
4	MR. GILLMAN: I just want to make sure that we
5	have time to study it, that it wasn't a foregone
6	conclusion before we got to look at it.
7	MS. JOHNSON: Absolutely. And just so you
8	know, I've carried some of your opinions forward a couple
9	of times and stomped my foot, so those are things that we
10	will definitely bring back to the board that I think are
11	important.
12	MR. VANDERGRIFF: And I'll even tell you what
13	that is specifically.
14	MS. JOHNSON: We keep arguing sometimes.
15	MR. GILLMAN: I'm happy to join an argument.
16	MS. JOHNSON: Do you want me to say it?
17	MR. VANDERGRIFF: No. I was going to say it.
18	MS. JOHNSON: Okay, you go ahead, because I've
19	got a better one. Go ahead. I'm sorry.
20	(General laughter.)
21	MR. VANDERGRIFF: This board will have to make
22	a decision relative to whether or not, and at this point
23	we've said that we're not going to delegate any kind of
24	case authority. So there's various levels of delegation:
25	any of it, none of it, but a point that I wanted to at

least throw as a stalking horse out there for the industry to consider is this board at this point doesn't even have the authority to delegate cases.

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Now, we're pending a review from the attorney general that I have no idea when that will come in. It's been pending for months.

MR. BRAY: Today is the 180th day.

MR. VANDERGRIFF: I was going to say it's been pending for six months.

MS. JOHNSON: They're about two months behind, so it could be a while.

MR. VANDERGRIFF: So we have no idea. But even if we get that opinion, the advice of every lawyer, no matter what group they represent, has told me that you still need to address that statutorily. So my position would be not that we're delegating any authority yet, if ever, but that we at least ought to have the authority to delegate that case and we ought to make that clear, or a case or a grouping of cases.

Ms. Johnson has correctly pointed out to me in private discussions that because the board, at least on that point, has weighed in that they don't want to delegate, then we should give the board the option in discussion of whether we want to even allow the authority to delegate.

1 MR. GILLMAN: I was just fixing to bring that point up. Thank you very much. 2. MR. VANDERGRIFF: So anyway, my expectation is 3 that as we sort all of these together, we'll have a lively 4 discussion on that and numerous other ones at a board 5 6 workshop meeting in November, and I think we're on a 7 Tuesday this time, by the way, for everybody's schedule. I know that's a problem for Mr. Rush, but we will be back 8 here. The reason we have to be on a Tuesday -- well, Gail 9 will know the exact reason, but we couldn't get a room. 10 11 MS. ANDERSON: Veteran's Day. 12 MR. VANDERGRIFF: Veteran's Day. I'm sorry. It's a holiday. Because of the holiday, we couldn't come 13 14 on a Thursday. 15 MR. GILLMAN: What date is that again? 16 MR. VANDERGRIFF: Do you remember the exact 17 date? MS. ANDERSON: November 9. 18 19 MR. VANDERGRIFF: So the expectation will be 2.0 that this will be a discussion item then. 21 MS. JOHNSON: And it is my hope that by that time, if it's possible, and I'm probably going to be 22 2.3 seeking some nods, that we will send this out in plenty of time. Now, for me, I've read these in so many different 2.4 25 forms, and what we are trying to do, and to some extent we

have to back up to accomplish some of this, is like

Senator Carona had a bill that did not pass but it had

underlined for new language, strike-through for proposed

deletions and then as we have worked through the last

year, Jennifer has either highlighted things that we've

said that maybe we need to tweak or bracketed and then

comments are off to the side, so when you're reading it,

you're reading a panel along with comments.

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MR. GILLMAN: Pros and cons?

MS. JOHNSON: Yes -- well, I'm not sure so much it's pros and cons as where it came through and what the thought process is, and in reading that, you're not certain because even I've had to go back. We had some questions asked of us yesterday that, in all honesty, we've discussed this so many times for so many months in the past that I couldn't directly answer those questions.

And so it would be great. My hope is to get these to you as soon as possible so that you have several weekends to digest them, read through it. Also, it could be that we decide that what we need to do on some of these instances because we don't know what's going to happen -- we can't project every single thing that's going to come down the session, and I think that it's going to be an interesting session at best -- we have a very limited window of opportunity to get legislation in there and get

it passed before I believe we'll have a series of meltdowns between redistricting budget, possibly voter ID, I think is what they're going to open the session with, and then immigration, so those won't be controversial at all, I'm sure.

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So we might want to adopt some position statements, so I had even prepared for the chair, and I had one weekend to go through probably six days worth of information and he got loaded up pretty heavily on emails from me over the weekend, but even a resolution, and you can see somewhat the form. For example, the board believes a mobile society creates opportunity, our purpose is to facilitate and enable our industries to prosper, and so maybe some high level philosophy statements.

And in the last session alone, people associated with this agency dealt with 374 pieces of legislation that they had to be on point and on target between the various departments, and so it might be we won't have time to say something came up, we didn't ask you, but I need a philosophy statement to be able to go back to understand how do you feel.

Of course, we can't anticipate everything, but hopefully we'll have devised a mechanism, if we need to call a meeting to get everybody together to know what we need to do. We're still trying to fine tune how are these

going to be tracked. I have some ideas that I have not even had a chance to share with Ms. Giles to perhaps get implemented through the agency on how we can receive legislation.

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For example, every week I get from one our delinquent law firms every bill that's been filed that has to do with all of my associated duties and then there's a brief summary and then the status of those bills. And I can read through that and if I want more information, I can click on it and look at it, I can print it and take it with me and look at it later which it's nice to have that flexibility, or I can just go through it and just okay, I'm not worried about this, not worried about this, maybe assign something to somebody else.

But it's a good mechanism, and every single week that's updated, anything new is put in bold so I don't have to read through it again and again. It might be a five-page document the first time I receive it, it might be a 100-page document at the end of the session, but I only have to hit on the bolded items. So I'm going to be bringing a sample of that so that we can decide if this is something that will work.

But I do believe that most of our activity is going to happen very early on which early on could be March by the time they get things going.

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I do want to let you know that without exception the response from the industries and stakeholders was fabulous. They were so thrilled that somebody took the time to ask the question of what do you think, and I think that that says a lot for the creation of this agency and it definitely, although some people may not like this very much, encouraged me to continue exactly the path that we have been going.

Do you want me to mention any of these topics, or would you like me to save them for blood pressure medicine later?

MR. VANDERGRIFF: I think it's appropriate. couple of things, first off, actually -- and this is a we business, not an I business -- but when we originally started, one of the things that I wanted to accomplish was to focus on the outside industries and to bring them into the process, versus the traditional approach that's done in state agencies of just focusing on the legislature. my opinion, you need to have the industries that you oversee involved and engaged in what you're doing, and then they can become your biggest advocates, because if not, they'll surely be your biggest enemies when you're over there on the Capitol.

And I want to applaud Ms. Johnson for taking that task to heart and moving aggressively on it, and

certainly we've got Deborah Giles who is responsible for dealing with the outside industries and is doing that with her. I also want to note for the board, and you certainly can chime in and say anything else, that Mr. Serna has created a structure and it's a unique structure in that we have old divisions that had their own pieces that are kind of pulled together, but it's a very workable structure.

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We have Denise Pittard, and I think many of you know her, and she's responsible for our Legislative Appropriations Request, and at least for the moment, our self-directed semi-independent -- not for the moment on her but that's the title of it -- that we talked about in the last meeting. And then we've got what they call the Cap Group, and you may want to explain that a little bit more, but they analyze bills that come in fast and furious, the numbers that Ms. Johnson mentioned, that formerly resided in VTR and we have experts in the Motor Vehicle Division, former division, but now part of the agency, of TxDOT. And so we've got various people that are kind of pulling together.

But it's very clear, we've delivered a directive that legislative issues are, for the most part, policy questions, policy issues and the board is responsible for policy. And me, as the chairman, I'm a spokesperson and a messenger, and Ms. Giles (sic), as the

vice chair and Legislative Committee chair, I'd say she's the executive director of the legislation, moving it out. But clearly, we work within the confines of we're the policy and the staff executes that, and Ed has the people doing what they need to do.

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MR. SERNA: I'm sorry, Mr. Chairman. You probably meant Ms. Johnson as you vice chair.

MR. VANDERGRIFF: Yes, I did.

 $$\operatorname{MS.}$ JOHNSON: It would have been a demotion for ${\operatorname{Ms.}}$ Giles.

MR. SERNA: Sorry, Deborah, no promotion. (General laughter.)

MR. SERNA: During a session, just to make all the board members aware, during a session a lot of the staff's roles change. During an interim, staff that may be working on developing policy or procedures or forms or doing other kinds of research or day-to-day work, during a session their roles are refocused and the Cap Group is a good example of one in Vehicle Titles and Registration Division where they'll do a whole lot of research, put together a lot of presentation material, help put presentations together. Each of the divisions will assign at least one individual to concentrate on reading bills, completing an agency analysis of the bills, and then responding to any other legislative requests that we get.

And Vice Chair Johnson pointed out that during a session things begin to move very quickly. As an example, I think during the last session the agency, not the DMV at the time but TxDOT, was asked to insert language into a bill that was basically the 200-page bill that is the VTR bill that Vice Chair Johnson pointed out, to find a place to insert that language into another piece of legislation and we had 20 minutes to get that done. So things do begin to move very fast.

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But I think we're a big enough agency that
we've got a team that we draw on during the session that
becomes a dedicated resource, but we're a small enough
agency that during the interim they go back to doing other
work. We don't have a big pool of people sitting there
kind of waiting for legislation that's not coming back
around until another year and a half. So we are prepared
for that.

The chairman pointed out that we've got two primary individuals working in legislation in support of the chairman, Ms. Johnson and myself: Deborah Giles, who I'm calling our outside person, and Denise Pittard, our inside person. And inside and outside to me doesn't mean inside/outside the agency, it means who's dealing with the stakeholders, who's dealing with members, and then who's dealing with committees working sort of the back office to

get information, give information, that kind of stuff. I think we've got a really very qualified team.

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But one thing that we have to work on as a new agency and what's incumbent on me is making sure that we're not duplicating effort or that we're leaving a gap someplace where somebody thinks that somebody else is taking care of something, or we've got two people trying to take care of the same thing. It hasn't happened yet, but that's me sort of as a traffic cop making sure that that doesn't happen.

The other thing that we'll probably be doing is each of the division directors will be asked or could be asked and probably will be asked to provide information directly to committees, be available to be a resource. As state employees, we don't take a position on any bill, we're always neutral on a bill or any legislative position but we are available to be a resource and we'll make sure that we have the appropriate directors available, of course myself, and the general counsel available to provide resource information to any member or any committee, and we'll kind of move forward with that. But I think we've got a good structure in place.

We've had a few sort of softball pitches to us with the House Transportation Committee about a month or so ago and then Senate Transportation today with the

opportunity to put some material together, get it to the committee, and I think we're kind of fine tuning our game, so to speak, so I think we'll be ready to go. The hardest part is going to be reacting to all the bills that we get and making sure that we continue to advance things.

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Of course, the chairman and the vice chair carry the lead and the board members carry the lead, since legislation is a policy issue, but from my perspective, we really have three key things that we're going to be emphasizing during the session: of course, getting our appropriations, successfully making it through the appropriations process and getting our bill approved; second, the DMV cleanup; and then third -- and this is not necessarily in order except that appropriations is primary for me -- and then third, the Vision 21 cleanup.

At least that's what I understand from the chair and vice chair, these are the things that I'm going to be concentrating on and have staff concentrate on, so that if there's anything that a board member identifies or needs information on, you can certainly feel comfortable to contact me, contact Denise or contact Deborah directly. And of course, I'm not going to speak for two of my nine bosses, the chair and vice chair, but I'm certain you can contact them as well, but you can certainly any one of us to ask where a particular bill is at, where an issue is

at, what's coming up, or if there's any other information that you need.

So with that, that's pretty much all I have from the staff perspective.

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MR. VANDERGRIFF: One quick addition to this to make sure you're aware is today, as I've said -- but I didn't tell you the sum and substance of the testimony today -- I was asked to go over to -- well, by statute, I'm required as the chairman of the DMV to present to the legislature on a quarterly basis, and to the Governor's Office, regular updates about the agency and to present ideas for improvement. I mean, by law I'm requested to do that, and obviously I'm taking direction from you all.

At the last meeting I shared with you kind of my general thoughts that had been given to House

Transportation and you've all read them and agreed that those were good thoughts, so I relayed those again today.

I will tell you that the legislature, at least conceptually at this point, and I emphasize conceptually, is reacting very positively to the idea that, in essence, we do have to have a more formal complete independence from TxDOT and to stand up as a truly independent agency. The question will be in hard budget times exactly what that really gets to mean, but they certainly understand that and agree with that.

And it's been sometimes misinterpreted as an attack on TxDOT's culture or perhaps, even worse, an attack on DMV employees, and that's not the intent. It's just simply to morph us more and more as a collective agency into one that really truly works and emphasizes with the retail industry that we oversee and the consumer base that they are a part of.

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With that, the second idea is to, of course, morph into that and that really is a more retail approach which would gives us more direct control over fee-setting and our financial affairs and thus budget more like a real business, and that also gains traction. The more difficult thing will be not so much the business part of it but how do they give up control of the funding mechanism that generates a billion-plus dollars into the system. But there is enough interest to try to work that into something that works. So I think that we're going to be working on that and working on it hard.

And then last but not least, everybody buys into the fact that if we fully can achieve our potential, we can be an economic development engine that puts more money into Fund 6, and helps, not coddles or protects, but helps the industries that we serve do better and do more which, to me, more efficient, better climate so that they can make more money which in turn the state, through all

of its other avenues, can generate more fee income and more tax revenue to support things. So literally promote the business, let them do what they need to do best to earn more money and create more jobs in Texas, and there's some specifics to that as we go forward, but that's the general nature that is being very well received.

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I would ask any of the staff who are here if they think differently that heard that today, and certainly several of them have been there when I spoke to House Transportation. So Mr. Serna, I guess you're shaking your head yes, that's correct?

MR. SERNA: Yes. I did not hear anything different.

MR. VANDERGRIFF: So I think we've got some good friends and support in the executive branch and also in the House and Senate Transportation that is good there.

The second thing I want to tell you, because it relates to what we do, and we can talk more in detail but I'll use it on the legislative side, Chief Rodriguez and I, as well as Johnny Walker and Mr. Serna and Julie Beisert went to the Department of Motor Vehicles in Virginia and we really got a chance to see a completely integrated, high performing department of motor vehicles, and frankly, was very impressed from the executive director on down. I think they gave us a lot of very good

ideas, some great information and a great bar, if you will, to try to attain.

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And I'll let the chief say if he has anything additional to add on to that, but it was a very eyeopening trip.

And I also want to note we thanked Commissioner Holcomb for his attention, but I was blown away by the fact that not only did he spend time with us from roughly 8:30 in the morning till six o'clock at night, but he had full-blown presentations on every single part of his agency and the department directors that he had participated in that discussion. I mean, we were really rolled out the red carpet and given a lot of information.

And I used some of that today with our old friends with My Plates in discussion that they're making -- and I was saying My Plates is a good program, we are glad to have them as our partner -- but on a quarter of the registrations in the state of Texas, they're going to be making \$8 million a year or have been making \$8 million a year off of running the specialty license plates themselves. They do it inside the agency and they pay people on commission even, small but it is a commission in order to sell those, and I think extrapolated over a five-year period of time, that's \$40 million, and if we achieve all that we hope to achieve, we'll make \$25 million on a

state that has four times the amount of registrations that they do.

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And so that's not disparaging to My Plates, it's that that's my point about the type of environment that we need to have inside of this agency that encourages that type of creativity and development. The people are here to do it, we just have to create the environment in which they can succeed in doing that.

So with that, I'll turn it back to the vice chair to go through legislation.

MS. JOHNSON: I just have to add a funny comment that he communicated to me, and I know that we can be there someday, is that the Virginia DMV would sell anything that wasn't tied down if it was going to generate revenue for the state, and so we need to be thoughtful and think about how can we accomplish the same thing. So I think that was a neat statement, said a lot for them.

I do want to say for the board that any relationships that you have with any legislators, House or Senate members, are going to be extremely critical as we go into the session, and so if we think that we're going to run up against a wall on some issue and might need your help, I will certainly be calling on you or asking if any of you do have legislative contacts to please be ready to get those numbers dialed into your cell phones and help us

out. So we'll have an action plan for that.

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Do you want me to go through these? Some of the resolutions or part of the resolutions -- and I'm sorry I didn't have time to copy this for you -- one of the purposes of this is also staff deserves and needs clear direction on what this board wants, and so with that in mind, some of the philosophy that I was putting together, I had started to read, and this was basically from your statements to the legislature in one of your last reports, and I'm going to read this as it is:

The board of the Texas Department of Motor

Vehicles believes a mobile society creates opportunity and

that it is our purpose to facilitate and enable the

associated industries to prosper and to support

legislation that supports job opportunity and builds a

stronger economy so that Texas remains competitive in the

global marketplace.

And please stop me if you disagree with any of these.

The board of the Texas Department of Motor

Vehicles supports legislation that will result in

streamlined operations that will allow for the advancement

of associated industries and partners but that provides

protection and advocacy for consumers.

The board of the Texas Department of Motor

Vehicles supports legislation that will result in funds previously dedicated to VTR technology improvements to be expanded to include coordinated and compatible agency-wide technology improvements.

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The board of the Texas Department of Motor

Vehicles supports legislation that allows the board by

rule to adopt changes to fees and commissions. And I have

to add a comment that it was asked yesterday which ones,

all or just VTR, so we will need to discuss that.

The board of the Texas Department of Motor

Vehicles supports legislation that allows the department
to operate as a self-directed, semi-independent entity.

The board believes that this will provide greater

financial decision-making capability, more timely
responsiveness to the industries and public served, and
increase revenue to the state.

The board of the Texas Department of Motor

Vehicles supports legislation that prohibits the titling

and registration of homemade vehicles.

Those were some of the points that were very easy for me to write about. I can continue if any of you have strong feelings about some of these other items. I think that you're going to have an opportunity in November to discuss them. If you want me to run through these very quickly so that they don't have a chance to get too

excited about any of them, I can.

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MR. VANDERGRIFF: I think we need to get them more fleshed out and send them to them.

MS. JOHNSON: Okay. So we're going to continue to work and get this information to you just as quickly as we can without unduly burdening staff.

I think I spent the entire weekend last weekend working on this and then I was up until about midnight the other night trying to get these notes prepared. I apologize if it's a little rough, it's pretty much the best I could do. But I hope that you will work with us on this, and thank you. That's all I have.

MR. VANDERGRIFF: I think I'll go back you up the top, and again, I apologize. I believe, and correct me if I'm wrong here, but we had talked about the board processes and the roles, we have several documents in that regard, but I believe you were hoping that we could have all the board members present when we do that, and the same goes with point number 2. So I'll ask the board, we can hand out some things but we'd like to pass those -- I'm deferring to the vice chair on that -- we'd like to pass those until our next meeting, and if we have time we can perhaps pick them up tomorrow if it turns out that our caseload isn't as much as it has been, although I' not sure it's posted on that agenda so I'm not sure we can.

It is posted. Okay, so we can do it.

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And with that, Mr. Serna, I don't know if you have any further, did you want to cover anything on the other two.

MR. SERNA: Yes, sir, very briefly, and this is something that I'll discuss tomorrow with the board members with regard to the organizational assessment, but there were some documents that were distributed, I guess it was last month, for the first time this agenda was posted concerning agency goals and performance objectives for the agency as a whole. I think there was also a document that specifically addressed executive director's performance. We'll distribute that document again.

What I'd like to do is get the individual board members' feedback on those. I've had some conversations with some of you on those documents, recognizing that we need to provide a little bit more detail.

You'll recall that we prepared the agency's

Strategic Plan that has performance measures in it, but

one of the things that we talked about when we did that

was to say we wanted to create, I guess, some more

realistic performance measures, things that really

reflected what we did, not just things that the

legislature wanted us to report on like the number of

vehicles that we had titled, but maybe something along the

lines of our turnaround time in issuing licenses to dealers or renewals of licenses or turnaround time on enforcement cases or things like that.

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So I can certainly redistribute those documents, but what I'm going to be asking from the board members is some specific feedback on what would help you see how the agency is doing, how it's performing the assignments or the missions that you've give us to do, some things that are concrete versus things that are sort of outside of our control. Again, the number of vehicles that we register, that's kind of outside of our control, it's the number of people that either buy cars or --

MR. VANDERGRIFF: It's budget.

(General laughter.)

MR. SERNA: Right, exactly. But things that are more meaningful to you to determine what our performance is.

The agency goals, again, we've got goals in our Legislative Appropriations Request. The chairman elaborated on at least three very clear goals in his testimony, I believe it was three very clear goals in his testimony to House Transportation about a month or so ago. We'll be formulating those as a basis to start from, and if there's anything that the board members want to add to that or clarify there, we'll certainly do that. But the

staff is considering, and I think the board actually took an action at the last board meeting that said yes, those are sort of the agency goals that we want to move forward with. We're going to work to build performance measures off of those.

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The thing that I'm going to discuss tomorrow that's linked back to this is we have an organizational assessment. Again, at the last full board meeting the board charged me with getting information on how we would move forward with that and presenting some options for moving forward, and I'll be doing that. Part of that organizational assessment should also result in -- or I'm going to propose should also result in developing some other performance measures that say yes, we'd recommend that the organization look like this and in order to measure how effective that particular structure is performing its goal, these are the measures that we want to hold the agency against. So I'll be linking those two together.

And that's kind of it in a nutshell, Mr. Chairman.

MR. VANDERGRIFF: We did have, and I'll make sure we pass these out so you have it so you can read this, we'll also make sure it's by email, but the vice chair had put together some proposed operating procedures

for our board to consider just so you have it here today. We'll take it up as soon as we have the full board. We discussed this last month. We also had just a recapping, the initial goals that our board discussed with respect to the agency, and I think at some point it can certainly be amended or modified, but these initial goals, and then additional ones that have been brought up with Mr. Serna's comments, we can merge all this together.

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But I'm going to give you this paperwork.

Since we've been basically carrying it for two months, I think you need to have it.

Again, the first one was adopted -- or not adopted but was discussed shortly after the executive director came onboard in February, and this last one is just kind of bubbled-up thoughts from the board that I've heard. And then you have by your table, I think all of you had one sheet of paper, it's printed on both sides, a very small amount on the back side, but one sheet of paper that Dawn Heikkila had prepared that was kind of a synopsis of some of the thoughts and ideas that we'd had and made it very clear, based on roles and responsibilities as a policy board kind of where the DMV board is, and as the executors of that policy and responsible for the day-to-day operations, where the delineation between board and staff is.

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So these are four documents that we can use them tomorrow, if we have the time we will use these, and if not, then they'll carry to our next meeting. But we certainly want to get this, as well as the organizational assessment and agency performance metrics or performance quidelines out ASAP.

MS. JOHNSON: If I could have the liberty of interjecting, with regard to the board operating procedures, I want to explain, I know you all tire of hearing that I served on a school board for six years that every year we had two new school board members, every single year we had at least two and sometimes three. And so right after elections after we reorganized the board, then we would have a team meeting, a workshop, we'd go outside. And I keep thinking that Mr. Rush's farm where he has javelina outside the gate would be a really great place to meet because we have to have an open meeting, we just don't want to encourage a lot of attendance.

Because we really need to be able to sit down and say how do we want to operate as a team of ten as the board and the executive director, how do we want to communicate with staff so that staff isn't running like crazy, how do we want to, if we need information, if we have questions on the agenda, what's appropriate. I am a protocol person and I do not believe that it is fair to

put staff on the hot seat at any point in time, and so if we have a problem with something on the agenda, can we submit that in advance so they can be prepared to answer the questions rather than to be left to feel ridiculous.

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I just think that there's a way to treat one another and there's a way to treat staff, and that it would make it a lot easier for all of us to work together as a cohesive team if we can agree on some way to operate together.

So please do read this. Understand I am not an expert in writing, I used the basis that started when I was on the Clear Creek School Board, I started with that, and I think I caught every place where it said Clear Creek ISD and changed it. It might not be 100 percent appropriate but it was about the best, I gave it as much time as I could to get some type of document together so you would have a starting point.

MR. RODRIGUEZ: Mr. Chairman, I want to make a couple of observations on a couple of statements. One is we're not a school board.

MS. JOHNSON: Oh, absolutely.

MR. RODRIGUEZ: And two, I don't want to be part of any meeting where we discourage attendance. And three, law pretty much dictates how we operate already. Thank you.

MR. VANDERGRIFF: Duly noted.

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The last one, I forgot one that should have been passed around, was Ms. Johnson had done this and they're attached to your other one, but we took them out and attached them as a separate document which is just the core values and potential board goals. So again, this is what she had prepared.

Your comments are duly noted.

MR. RODRIGUEZ: Thank you.

MR. VANDERGRIFF: Mr. Serna, do you have any additional business you want to cover?

MR. SERNA: No, sir, I do not.

MR. VANDERGRIFF: We do have the need for executive session, it's to be a short session with the board only dealing with Section 551.074 on personnel matters, and then we will upon further need perhaps have additional discussion with our counsel and executive director on those matters, and also potentially Section 551.071 which is consultation with and advice from legal counsel regarding any item on the agenda.

So with that, I would say that we are adjourned from regular session at approximately 3:10 in the afternoon and we would be going back into executive session in ten minutes.

For the audience's sake, I anticipate being in

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executive session for no more than 30 minutes, and we will 1 reconvene in open session but the only purpose of 2. reconvening is to adjourn, so I do want to make that clear 3 to the public that we will not be taking any action after 4 executive session. There will be no item discussed that 5 we'll need to take action. 6 7 (Whereupon, at 3:10 p.m., the meeting was recessed, to reconvene this same day, Wednesday, October 8 13, 2010, following conclusion of the executive session.) 9 MR. VANDERGRIFF: It is 4:27 in the afternoon 10 11 and we are back in open session, and I do want it known 12 that we did not take any action in executive session. And with that, I will ask for a motion to 13 adjourn. 14 15 MR. GILLMAN: So moved. MR. BUTLER: Second. 16 17 MR. VANDERGRIFF: We have a motion and a second from Directors Gillman and Butler, and no discussion. 18 19 Raise your right hand signifying aye. 20 (A show of hands.) 21 MR. VANDERGRIFF: The meeting is adjourned. Thank you for attending. 22 (Whereupon, at 4:28 p.m., the meeting was 23 concluded.) 2.4

<u>CERTIFICATE</u>

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MEETING OF: Department of Motor Vehicles board

4 LOCATION: Austin, Texas

DATE: October 13, 2010

I do hereby certify that the foregoing pages, numbers 1 through 78, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy H. King before the Texas Department of Motor Vehicles.

10/20/2010 (Transcriber) (Date)

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